UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued April 19, 2004 Decided August 13, 2004

No. 03-5237

SECURITIES AND EXCHANGE COMMISSION,
AND
DEBORAH R. MESHULAM,
APPELLEES

v.

PAUL A. BILZERIAN
APPELLEE

v.

ERNEST B. HAIRE, III,
APPELLANT

Appeal from the United States District Court
for the District of Columbia
(No. 02cv01221)

S. Scott Morrison argued the cause for appellant. On the briefs was *G. Michael Nelson.*

Charles B. Wayne argued the cause for appellee Deborah R. Meshulam. On the brief was *Deborah J. Israel.*

Before: SENTELLE, ROGERS, and GARLAND, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* GARLAND.

GARLAND, *Circuit Judge*: This case is ancillary to a long-standing Securities and Exchange Commission (SEC) enforcement proceeding against Paul A. Bilzerian for violation of federal securities laws. The United States District Court for the District of Columbia created a receivership estate and appointed a receiver to satisfy the SEC's judgment against Bilzerian's assets. In the instant action, the receiver filed a complaint against defendant Ernest B. Haire, III, to collect on the principal, interest, and fees due and owing to the receivership estate on a $1 million loan. Haire moved to dismiss the complaint, alleging that the court lacked personal jurisdiction over him, that venue in the District of Columbia was improper, that the forum was not convenient, and that the receiver had failed to join a necessary party. The district court rejected those challenges, and entered summary judgment in the receiver's favor. We affirm.

I

In 1993, the United States District Court for the District of Columbia ordered Bilzerian to disgorge over $33 million in profits and $29 million in prejudgment interest obtained from his unlawful transactions in several common stocks. *SEC v. Bilzerian*, 814 F. Supp. 116 (D.D.C. 1993), *aff'd*, 29 F.3d 689 (D.C. Cir. 1994). On December 22, 2000, after finding Bilzerian in

contempt for failing to pay the 1993 disgorgement judgment, the district court appointed the appellee, Deborah Meshulam, as receiver "for the purpose of identifying, marshaling, receiving and liquidating [Bilzerian's] assets." *SEC v. Bilzerian*, 127 F. Supp. 2d 232, 232 (D.D.C. 2000), *aff'd*, 2003 WL 22176183 (D.C.Cir.2003)(hereinafter Receivership Order). The Receivership Order authorized the receiver to "take and maintain complete and exclusive control, possession and custody of Bilzerian's assets wherever situated" and to "liquidate any interest in any asset held by anyone on behalf of Bilzerian, including but not limited to the initiation and prosecution of litigation against others to recover such asset and/or interests in asset on behalf of the Receivership Estate." *Id.* at 233. The receiver filed copies of the Receivership Order in various federal district courts, including the United States District Court for the Middle District of Florida where Haire resides.

The assets of the receivership estate included, inter alia, the assets of Overseas Holdings Limited Partnership (OHLP), a partnership owned by the Bilzerian family to which Bilzerian transferred substantial assets during the course of the SEC litigation. On July 12, 2000, during the pendency of the contempt proceeding against Bilzerian, OHLP loaned Haire $1 million. The loan was reflected in a promissory note (the "Note"), which accrued interest at an annual rate of 12% and made the principal payable on demand. The Note was secured by Haire's pledge of his stock shares in Cimetrix, Inc. OHLP demanded payment on August 23, 2000, and Haire's failure to pay within 15 days of that demand triggered the Note's

terms governing default and penalties. Haire and OHLP subsequently executed a Forbearance and Extension Agreement on March 1, 2001, under which Haire agreed to pay accrued interest immediately, and OHLP agreed to extend the due date for payment of principal until March 1, 2003.

In December 2001, OHLP agreed to "transfer to the Receiver all right, title and interest in that certain note and stock pledge agreement and related documents by Ernest Haire III in the principal amount of $1 million, as extended." Consent and Undertakings Agreement at 5 (J.A. 87); *see also* Assignment Without Recourse (J.A. 100). Haire, in his capacity as trustee of another Bilzerian-related entity, signed the agreement. On January 16, 2002, the court entered the agreement as a consent judgment. On April 19, 2002, the receiver sent a letter to Haire demanding that he immediately pay all accrued and unpaid interest due on the Note, and warning that failure to pay within fifteen days would result in a default under the Note's express terms. Haire failed to pay, and the receiver notified him that the entire $1 million principal (and accumulated interest and penalty fees) was immediately due.

On June 19, 2002, the receiver filed the present complaint against Haire, demanding judgment for the full amount of principal and accrued interest under the Note. Haire filed a motion to dismiss the complaint on the grounds of lack of personal jurisdiction, improper venue, forum non conveniens, and failure to name an indispensable party. At the same time, the receiver moved for summary judgment. The district court

denied Haire's motion to dismiss, Mem. & Order (D.D.C. Jan. 17, 2003) (hereinafter Jan. 2003 Mem. Op.), and granted the receiver's motion for summary judgment, Mem. & Order (D.D.C. July 17, 2003) (hereinafter July 2003 Mem. Op.).

Haire now appeals.[1] We review both of the district court's orders de novo. *See Gormon v. Ameritrade Holding Corp.*, 293 F.3d 506, 509 (D.C. Cir. 2002); *Gilvin v. Fire*, 259 F.3d 749, 756 (D.C. Cir. 2001). In Part II, we consider Haire's challenge to the court's conclusion that it had personal jurisdiction. In Part III, we consider Haire's remaining objections to the court's order denying dismissal, as well as his objections to the court's grant of summary judgment to the receiver.

II

We begin with the threshold question of whether the United States District Court for the District of Columbia has personal jurisdiction over the defendant, a Tampa, Florida resident who claims not to have any

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[1]Haire also appeals the district judge's 2002 denial of his motion to recuse the judge from participation in Haire's case. *See* Mem. & Order (D.D.C. Dec. 4, 2002). Haire previously sought to overturn that denial by petitioning for a writ of mandamus. In denying the writ, a panel of this court readily held that the "district court did not abuse its discretion in deciding not to recuse." *In re: Ernest Haire*, 2003 WL 1873948, at *1 (D.C. Cir. 2003). That holding, premised not on the elevated standard of review for mandamus, but rather on the same standard that we would apply to the recusal question on appeal, is the law of the case.

contacts with the District of Columbia. In *SEC v. Vision Communications, Inc.*, a case also involving a receiver in a proceeding ancillary to an SEC enforcement action, we explained how such personal jurisdiction could be obtained. 74 F.3d 287, 290–91 (D.C. Cir. 1996). Step one involves Federal Rule of Civil Procedure 4(k)(1)(D), which provides that "[s]ervice of a summons or filing a waiver of service is effective to establish jurisdiction over the person of a defendant . . . when authorized by a statute of the United States." Fed.R.Civ.P. 4(k)(1)(D). Step two requires a statute that provides the "needed 'authorization' to have [the defendant] served" in a district "outside the territorial boundaries of the U.S. District Court for the District of Columbia." 74 F.3d at 290. Section 1692 of Title 28, we said, could provide such authorization. *Id.* That section states:

> In proceedings in a district court where a receiver is appointed for property, real, personal, or mixed, situated in different districts, process may issue and be executed in any such district as if the property lay wholly within one district but orders affecting the property shall be entered of record in each of such districts.

28 U.S.C. § 1692. Finally, "to invoke § 1692, a receiver first must comply with 28 U.S.C. § 754." 74 F.3d at 290. Under that section, "a receiver appointed in one district may obtain jurisdiction over property located in another district by filing in the district court of that district, within ten days after the entry of his order of appointment, a copy of the complaint and his order of

appointment." *Id.*[2] Thus, we said, § 754 is "a stepping stone on [the court's] way to exercising *in personam* jurisdiction over" one who holds receivership assets in a remote district. *Id.* at 290.[3]

As precedent, *Vision Communications* relied on the Sixth Circuit's decision in *Haile v. Henderson National Bank*, 657 F.2d 816 (6th Cir. 1981), which is on all fours with the case presently before us. In *Haile*, a receiver was appointed in the Middle District of Tennessee for a bankrupt church and its assets. *Id.* at 818. The receiver then brought suit against an individual in the Northern District of Alabama who had defaulted on a note held by the church. *Id.* at 820. The Alabama defendant resisted on the ground that

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[2]Section 754 provides, in pertinent part:

> A receiver appointed in any civil action or proceeding involving property, real, personal or mixed, situated in different districts shall, upon giving bond as required by the court, be vested with complete jurisdiction and control of all such property with the right to take possession thereof.... Such receiver shall, within ten days after the entry of his order of appointment, file copies of the complaint and such order of appointment in the district court for each district in which property is located. The failure to provide such copies in any district shall divest the receiver of jurisdiction and control over all such property in that district.

[3]Further support for the proposition that § 754 is a "stepping stone" is the fact that, prior to 1948, the provisions of both sections were contained in a single predecessor statute, 28 U.S.C. § 117 (1940). *See* Reviser's Notes, H.R. REP. NO. 80–308, at 1807, 1869 (1947) (noting that § 117 was the basis for §§ 754 and 1692).

the district court in Tennessee lacked personal jurisdiction over him, and that court agreed, concluding that while they may provide the court with control of the property of the debtor, "neither 28 U.S.C. § 754 nor 28 U.S.C. § 1692 . . . grants this court personal jurisdiction of the defendants." *Id.* at 820.

The Sixth Circuit reversed. It held that, pursuant to § 754, "the territorial jurisdiction of the appointing court is extended to any district of the United States where property believed to be that of the receivership estate is found, provided that the proper documents have been filed in each such district as required by § 754." *Id.* at 823. It noted that "Rule 4 of the Federal Rules of Civil Procedure contemplates the use of statutes of the United States which provide for service of process upon a party not . . . found within the state in which the district court is held." *Id.* at 824. And it concluded that the "statute of the United States which provides for service of process beyond the territorial limits of the state in which the district court sits in the case at bar is 28 U.S.C. § 1692." *Id.* "The process authorized by § 1692," the court said, "is not 'extra-territorial' but rather nationwide." *Id.* at 826. Under that section, "[t]he appointment court's process extends to any judicial district where receivership property is found." *Id.*

In *American Freedom Train Foundation v. Spurney*, the First Circuit pronounced itself in "agreement with the Sixth Circuit's holding that pursuant to sections 754 and 1692, '[t]he appointment court's process extends to any judicial district where receivership property is found.' " 747 F.2d 1069, 1073

(1st Cir. 1984) (quoting *Haile*, 657 F.2d at 826). And both circuits' discussions paralleled, and *Haile* expressly relied upon, the views of Professor Moore, who concluded: "[I]n cases under these two sections, the minimum contacts analysis of *International Shoe* as a limitation on extraterritorial power, does not apply, since service of process under § 1692 [is] nationwide." 7 (Pt. 2) JAMES WM. MOORE, MOORE'S FEDERAL PRACTICE ¶ 66.08[1] (2d ed. 1996).

In the present case, the district court followed the analysis outlined in *Vision Communications* and *Haile*. The court found that the receiver had complied with § 754 by filing the appropriate documents in the Middle District of Florida, and that this compliance meant that § 1692 authorized service of process. The court further found that Haire had been properly served. Citing Rule 4(k)(1)(D), the court concluded that it therefore had personal jurisdiction over the defendant. Jan. 2003 Mem. Op. at 5.

Haire does not dispute that the receiver filed the appropriate documents in Florida, or that he received service of process there. What he disputes is the district court's authority to issue process to obtain *in personam* jurisdiction over an out-of-state defendant. Section § 1692, Haire contends, authorizes extraterritorial service of process only to obtain *in rem* jurisdiction — jurisdiction over property — in another district, and not *in personam* jurisdiction over a defendant in such a district. When a court exercises only *in rem* jurisdiction,"the resulting judgment can affect only the property" and "cannot personally bind absentees simply on the basis of their interests in the

property." 4A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 1070, at 281 (3d ed. 2002) (hereinafter WRIGHT & MILLER).

Haire's contention is, of course, inconsistent with the explanation of the role of § 1692 that we enunciated in *Vision Communications*. Haire contends that explanation was dicta because, in *Vision Communications*, the receiver had failed to make the necessary filings within the ten days required by § 754, which "precluded the district court from using § 754 as a stepping stone on its way to exercising *in personam* jurisdiction." 74 F.3d at 290. Thus, he says, the court's discussion of § 1692 was unnecessary. Haire may be technically correct, but it is apparent that the *Vision Communications* court did not think so. The court made clear that, but for the failure to comply with § 754, the "interplay between Rule 4(k)(1)(D) . . . and 28 U.S.C. § 1692 could have provided th[e] authorization" for service of process sufficient to establish jurisdiction over the person of the defendant. *Id.* at 290. And it ended its opinion with a direction to the parties that it would not have issued had it not thought § 1692 authorized the service necessary to bind the defendant:

> On remand, the court may reappoint the receiver and start the ten-day clock of § 754 ticking once again. Presumably, the receiver will take advantage of his second chance. . . . Once he does so, the receiver will have jurisdiction over the Pennsylvania property and may seek to have Vista Vision served in Pennsylvania under 28 U.S.C. § 1692.

Id. at 291.

The defendant asks us to cast aside our statements in *Visions Communications*, as well as the Sixth Circuit's decision in *Haile*, and accept instead the analysis found in an unpublished opinion from the Northern District of Illinois. That court held that § 1692 "merely authorizes extraterritorial service of process in aid of *in rem* actions and does not do so in cases like this one in which the receiver seeks an *in personam* judgment." *Stenger v. World Harvest Church, Inc.*, 2003 WL 22048047, at *2 (N.D. Ill. 2003). The basis for the *Stenger* court's conclusion was that § 1692 "does not mention *service* of process; rather it speaks only of *issuance* and *execution* of process." *Stenger*, 2003 WL 22048047, at *2. In the *Stenger* court's view, "service of process" and "issuance of process" are not the same thing: only "service" achieves *in personam* jurisdiction; "issuance" is merely the "Clerk's ministerial act of issuing a summons to a plaintiff so that he or she can serve it on the defendant." *Id.* Moreover, *Stenger* continued, "service" and "execution" are also different: while "service" achieves *in personam* jurisdiction, "execution of process involves the act, in an *in rem* action, of attaching property." *Id.*

Section 1692 states that "in a district court where a receiver is appointed for property" — which is the case of the district court here — "process may issue and be executed." 28 U.S.C. § 1692. As *Stenger* concedes, "process" generally refers to "a summons or writ, [especially] to appear or respond in court." *Stenger*, at *2 (quoting BLACK'S LAW DICTIONARY 1222 (7th ed. 1999)). The remaining question,

therefore, is the meaning of "may issue" and "be executed." And neither Congress nor the courts have restricted those terms to the meanings insisted upon by *Stenger*.

Even if *Stenger* were correct that "issuance" is merely the "Clerk's ministerial act of issuing a summons," federal rules, statutes, and court opinions have used "execution" as more than merely a synonym for "attaching property." Indeed, Rule 79 of the Federal Rules of Civil Procedure uses "execution of process" as roughly synonymous with "service of process." *See* FED. R. CIV. P. 79 (requiring that the civil docket contain entries showing "the substance of each order or judgment of the court and of the returns showing execution of process"). In that sense, providing that a summons "may issue and be executed" means that the summons may issue and be served. *See also* BLACK'S LAW DICTIONARY, at 589, meaning 1 (defining execution as the "act of carrying out or putting into effect (as a court order)").

"Execution" is also often used to mean the method by which a judgment, including a judgment *in personam*, is enforced.[4] This is as distinct from "attachment," which is often used to denote the method

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[4]Indeed Rule 69, entitled "Execution," provides that "[p]rocess to enforce a judgment for the payment of money shall be a writ of execution." FED. R. CIV. P. 69(a); *see also* FED. R. CIV. P. 62 (providing that "no execution shall issue upon a judgment" until 10 days after its entry); 28 U.S.C. § 1961 (declaring that "[i]nterest shall be allowed on any money judgment," and that "execution therefor may be levied by the marshal").

by which *in-rem* (or *quasi-in-rem*) jurisdiction is obtained.[5] In this sense, then, "may issue and be executed" describes the entire process from initial issuance, through service, through judgment, to final enforcement of judgment.

There is also no support for *Stenger*'s insistence that "issuance" is limited to a clerk's ministerial act. Congress has used "issue" as shorthand to comprehend the phase of the process that extends from issuance of an order through and including its service.[6] Similarly,

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[5]*See* 4A WRIGHT & MILLER § 1070, at 291–92; *see also Pennoyer v. Neff*, 95 U.S. 714, 720 (1877) (finding no jurisdiction because, since the property at issue "was not attached" and its "first connection with the case was caused by a levy of the execution," it was therefore not "disposed of pursuant to any adjudication, but only in enforcement of a personal judgment, having no relation to the property, rendered against a non-resident without service of process upon him"); 28 U.S.C. § 1921 (providing for the collection of fees for different writs, including a writ of "execution," and a writ of "attachment in rem").

[6]*See* 15 U.S.C. § 77v(b) (providing that in "case of contumacy or refusal to obey [an SEC] subpoena issued to any person," federal courts "may issue to such person an order requiring such person to appear before the Commission"); 28 U.S.C. § 2361 (providing that in "any civil action of interpleader or in the nature of interpleader . . . a district court may issue its process for all claimants"); Credit Mobilier Act, ch. 226, § 4, 17 Stat. 485, 509 (March 3, 1873) (providing that the "court where said cause is pending may make such orders and decrees, and issue such process as it shall deem necessary to bring in new parties"); *see also Robertson v. Railroad Labor Bd.*, 268 U.S. 619, 624 (1925) (noting that the Credit Mobilier Act provided jurisdiction *in personam* over defendants living in different states).

courts frequently use "issuance" and "service" interchangeably.[7]

In sum, common legal usage of the words employed in § 1692 support the views expressed by this court in *Vision Communications*, by the First and Sixth Circuits in *American Freedom Train* and *Haile*, and by scholarly commentary. Accordingly, we decline to part company with those views, and we conclude that the "interplay" between Rule 4(k) and 29 U.S.C. §§ 754 and 1692 properly provided the district court with jurisdiction over the person of Mr. Haire.[8]

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[7]*See, e.g., Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 108 (1987) ("[I]t is unclear at this time whether it is open to us to fashion a rule authorizing *service of process*. At common law, a court lacked authority to *issue process* outside its district, and Congress made this same restriction the general rule when it enacted the Judiciary Act.") (emphasis added); *Robertson*, 268 U.S. at 622–23 ("In a civil suit in personam, jurisdiction over the defendant . . . implies . . . either voluntary appearance by him or *service of process* upon him. . . . Under the general provisions of law, a United States District Court cannot *issue process* beyond the limits of the district.") (emphasis added); *In re: Bridgestone/Firestone, Inc., Tires Prod. Liab. Litig.*, 333 F.3d 763, 768 (7th Cir. 2003) ("The proposition that the federal court lacks the power to *issue nationwide process* must be qualified by the proviso 'unless a federal statute authorizes this step'; and one of the claims in the master complaint rested on RICO, which does authorize nationwide *service of process*.") (emphasis added).

[8]We also reject Haire's contention that, even if § 1692 authorizes the exercise of personal jurisdiction over him, to do so would violate the Due Process Clause because he lacks "minimum contacts" with the District of Columbia. *See International Shoe Co. v. Washington*, 326 U.S. 310 (1945). This circuit has held that the requirement of "minimum contacts" with a forum state is

III

The defendant's remaining challenges to the district court's denial of his motion to dismiss, and to its grant of the receiver's motion for summary judgment, require only brief discussion.[9]

A

Haire sought dismissal of the complaint on three grounds in addition to personal jurisdiction. First, he contended that venue was improper in the District of Columbia to enforce a contract signed in Florida between two Florida residents. But the district court correctly concluded that, because the receiver's complaint was brought to accomplish the objectives of the Receivership Order and was thus ancillary to the court's exclusive jurisdiction over the receivership estate, venue was properly established. Jan. 2003 Mem. Op. at 5; *see Haile*, 657 F.2d at 922 n.6 ("[W]here jurisdiction is ancillary, the post-jurisdictional consideration of venue is ancillary as well."); 20 WRIGHT & MILLER § 10, at 52–53 (noting with

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inapplicable where the court exercises personal jurisdiction by virtue of a federal statute authorizing nationwide service of process. *Briggs v. Goodwin*, 569 F.2d 1, 8–10 (D.C. Cir. 1977), *rev'd sub nom. on other grounds, Stafford v. Briggs*, 444 U.S. 527 (1980). In such circumstances, minimum contacts with the United States suffice. *See generally* 4 WRIGHT & MILLER § 1068.1, at 605–06.

[9]In addition to the core arguments set forth below, we have considered all of Haire's myriad variations and sub-arguments as well. We have concluded that they are without merit, and that they do not merit further discussion.

approval that, "where ancillary jurisdiction sufficed to allow a claim or a party without jurisdictional grounds, it was also unnecessary to satisfy the venue statutes with regard to that claim or party"); *see also Scholes v. Lehman*, 56 F.3d 750, 753 (7th Cir. 1995) ("The laying of venue . . . is authorized by 28 U.S.C. § 754, which allows a receiver to sue in the district in which he was appointed to enforce claims anywhere in the country.").

Second, Haire sought dismissal on the ground that the Note provides that all related actions must be brought in local Florida courts. Although Haire styled this as a forum non conveniens argument, his challenge centered not on the inconvenience or burden of litigating in the District of Columbia, but rather on the Note's forum selection clause. That clause states:

> Venue for any legal proceeding arising under this Note or the Stock Pledge Agreement shall be in the courts located in Hillsborough County, Florida and Maker and Holder waive any right to sue or be sued in any other venue *unless it shall be lawfully required that venue for any legal proceeding lie elsewhere.*

Promissory Note at 2 (J.A. 29) (emphasis added). In arguing that the forum selection clause requires suit in Florida, Haire ignores the clause's exception for cases in which "it shall be lawfully required that venue . . . lie elsewhere." *Id.* As the district court correctly concluded, the Receivership Order satisfies that exception. That Order, which was affirmed by this circuit in an earlier proceeding, provides that the United States District Court for the District of

Columbia "shall have *exclusive* jurisdiction over the Receivership Estate," and that "no person or entity shall bring any claim against . . . the Receivership Estate in any forum other than this Court." *Bilzerian*, 127 F. Supp. 2d at 234 (emphasis added), *aff'd*, 2003 WL 22176183 (D.C. Cir. 2003).

Finally, Haire contended that dismissal was required because the receiver failed to join OHLP, the original holder of the Note, as mandated by Rule 19(a)(1). *See* FED. R. CIV. P. 19(a)(1) ("Joinder of Persons Needed for Just Adjudication"); *see also* FED. R. CIV. P. 12(b)(7). Haire asserted that OHLP had fraudulently induced him to sign the Note, and that OHLP had to be joined in order for him to effectively raise that defense. But as Haire himself maintains, the receiver's only rights with respect to the Note were "derived from the assignment by OHLP," and "[a]s an assignee, [the receiver] merely step[ped] in the shoes of the assignor." Appellant's Br. at 30 (citing *Ned Chartering & Trading, Inc. v. Republic of Pakistan*, 294 F.3d 148, 153 (D.C. Cir. 2002)). Accordingly, as both parties agree, the receiver was "subject to all defenses and rights of setoff that Haire ha[d] against OHLP." Appellant's Br. at 31; *see* Appellee's Br. at 31–32. Because OHLP's presence was not needed for Haire to raise those defenses, "complete relief" could "be accorded among those already parties" and OHLP was not a necessary party. FED. R. CIV. P. 19(a)(1).[10]

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[10]Haire was also free, as the district court noted, to pursue claims for breach of contract, misrepresentation, and fraud that he had filed against OHLP in state court. Jan. 2003 Mem. Op. at 8. At the same time, there was no risk of double recovery against

B

Haire also appeals the district court's order granting summary judgment for the receiver, which held, inter alia, that Haire had to pay the receivership estate the principal amount of $1 million plus unpaid and accrued interest. *See* July 2003 Mem. Op. at 26. The purported issues of material fact that Haire asserted in opposing the receiver's motion for summary judgment did not contest anything in the receiver's statement of facts, but instead contested entry of judgment on the grounds of personal jurisdiction, venue, fraudulent inducement, breach of contract, and duress. The first two grounds raised issues identical to those raised in Haire's motion to dismiss, grounds that we rejected in Parts II and III.A. The remaining three are without merit.

Haire's first contention was that he was fraudulently induced into signing the Note. Haire's affidavit asserted that Bilzerian's wife (who controlled OHLP) had assured him that Bilzerian possessed no interest in OHLP's assets, and claimed that Haire did not learn the assurance was untrue (and that the assets were subject to claims by Bilzerian's creditors) until December 2001, more than a year after he signed the Note. But the district court found on the undisputed facts that the receiver had served Haire with copies of the December 2000 Receivership Order on "at least two occasions, the first being on December

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Haire because the consent judgment gave the receiver the sole right to enforce the Note. *See* Consent and Undertakings Agreement at 5 (J.A. 87).

22, 2000." July 2003 Mem. Op. at 17–18.[11] That Order decreed that the receivership estate "shall be comprised of" Bilzerian's assets, "including but not limited to . . . Overseas Holdings Limited Partnership," and was transmitted with a cover letter notifying recipients that those assets were to be "immediately surrendered to the Receiver." *Id.* (quoting Receivership Order and cover letter). Then, on March 21, 2001 — three months *after* he received this notice that OHLP's assets were subject to the claims of the receivership estate — Haire signed an extension agreement (the Forbearance and Extension Agreement) with OHLP that reaffirmed his obligations under the Note. That reaffirmation, the court held, waived any fraud defense he might have under Florida law. We agree. *See Harpold v. Stock*, 65 So. 2d 477, 478 (Fla. 1953); *Price v. Airlift International, Inc.*, 181 So. 2d 549, 550–51 (Fla. App. Ct. 1966).

Second, Haire contended that OHLP had breached its obligation under the Note by failing to permit him to sell the stock he had pledged as security. But the Note does not mention any such obligation, and the district court correctly found that evidence of a prior or contemporaneous oral agreement is inadmissable under Florida's parol evidence rule when — as here — the contract is unambiguous. *See Ungerleider v. Gordon*, 214 F.3d 1279, 1282 (11th Cir. 2000).

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[11] Haire's opposition to summary judgement did not dispute the receiver's statement that she had served two copies of the Receivership Order upon him in December 2000. *See* Ernest B. Haire's Opp'n to Receiver's Mot. for Sum. J.

Finally, Haire alleged that *OHLP* had assigned the Note to the receiver under duress. Even if that were true, it would not offer *Haire* a defense to payment on the Note. Moreover, this court has previously held that Haire lacks standing to collaterally attack the consent judgment in which OHLP agreed to assign the Note to the receiver. *See SEC v. Bilzerian*, 2002 WL 1998001, at *1 (D.C. Cir. 2002). Accordingly, the court's grant of summary judgment for the receiver was appropriate.

IV

For the foregoing reasons, we affirm the district court's denial of Haire's motion for dismissal of the receiver's complaint, as well as the court's grant of the receiver's motion for summary judgment.

Affirmed.

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

DEBORAH R. MESHULAM, AS RECEIVER FOR THE SEC v. PAUL BILZERIAN, CIVIL ACTION NO. 89-1854 (SSH) RECEIVERSHIP ESTATE,	)
Plaintiff,	)
v.	)No.1:02cv1221(RCL)
ERNEST B. HAIRE, III,	)
Defendant.	)

MEMORANDUM AND ORDER

This matter comes before the Court on defendant Ernest B. Haire III's ("defendant") motion to dismiss [6-1], which was filed on November 18, 2002. Upon consideration of defendant's motion, receiver-plaintiff's opposition thereto, defendant's reply brief, and the applicable law in this case, the Court finds that the defendant's motion should be denied.

A. FACTUAL BACKGROUND

This case represents an outgrowth of SEC v. Bilzerian, Civil Action Number 89-1854, which was a civil action brought against Paul A. Bilzerian over a decade ago. In 1993, the Court entered two judgments

against Bilzerian, ordering him to disgorge over $33 million in unlawful profits and over $29 million in prejudgment interest. In November of 1998, the Securities and Exchange Commission commenced contempt proceedings against Bilzerian for his refusal to comply with these orders. These proceedings resulted in a finding of contempt against Bilzerian, and on December 22, 2000, the Court appointed a receiver over Bilzerian's assets, in accordance with the equitable discretion bestowed upon it under the federal securities laws. The Court later amended this order on March 1, 2002. The orders encompassed Bilzerian's legal and equitable interests in the assets of Overseas Holdings Limited Partnership ("OHLP").

In July of 2000, defendant executed a promissory note in favor of OHLP in the amount of $1 million. On January 16, 2002, the Court ordered OHLP to transfer all of its rights, title, and interests in this note to the receiver of the Bilzerian assets. On June 19, 2002, the receiver commenced the instant proceedings against defendant.

II. ANALYSIS

A. Personal Jurisdiction

Defendant alleges that this Court lacks personal jurisdiction over him. Defendant is mistaken. A year and a half ago, during the Bilzerian case, this Court addressed a similar contention by defendant, which warrants quotation at some length:

Both the 1994 Trust and Ernest B. Haire, III,

argue that the Court does not have jurisdiction over them and thus cannot impose a freeze on their assets. They are mistaken. . . .The statutory language of 28 U.S.C.§ 1692 makes clear that this Court's Orders are binding upon the 1994 Trust and Mr. Haire, so long as the Receiver has complied with the requirements of 28 U.S.C. § 754. The Receiver has perfected her jurisdiction over the property of the receivership pursuant to 28 U.S.C. § 754. Therefore, 28 U.S.C. § 1692 establishes that the Court has jurisdiction over the Bilzerian and Bilzerian-related property in Florida, "as if the property lay wholly within" the District of Columbia. The Court has determined that the 1994 Trust and Cimetrix stocks held by Mr. Haire are Bilzerian-related property in Florida, and therefore, the Court has jurisdiction over that property pursuant to 28 U.S.C. § 1962.

Nevertheless, Mr. Haire and the 1994 Trust claim that they are not parties to this action and cannot be forced to comply with an order of this Court. The Federal Rules of Civil Procedure, however, specify that non-parties against whom "obedience to an order may be lawfully enforced" are subject to the "same process for enforcing obedience to the order as a party." Fed. R. Civ. P.71.

Therefore, because the Court finds that it has jurisdiction over the 1994 Trust and Mr. Haire sufficient to support the relief requested by the Receiver. . . ., the Motions of the 1994

Trust and Mr. Haire are hereby DENIED.

Order dated June 1, 2001, at 5-6 (emphasis added).[1]

The plain language of this Order belies defendant's assertions that it only resolved the issue of the Court's in rem jurisdiction over defendant's property, not jurisdiction over defendant's person. It was necessary for the Court to exert jurisdiction over the person of defendant because a portion of the relief ordered was directed to defendant himself, not to the property owned by him. See id, at 3-4 ("[I]t is further ORDERED that, by June 8, 2001, the 1994 Trust, Puma and Ernest B. Haire III . . . shall turnover all Cimetrix Securities presently held by the 1994 Trust, Puma and/or Ernest B. Haire III . . . to the Court's registry."). And, as a case cited by defendant points out, "[i]njunctive relief, by its very nature, can only be granted in an in personam action commenced by one party against another in accordance with established process. Consequently, a party cannot obtain injunctive relief against another without first obtaining in personam jurisdiction over that person or someone in legal privity with that person." R.M.S.

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[1]28 U.S.C. § 754 provides, in relevant party, that "[a] receiver appointed in any civil action or proceeding involving property, real, personal or mixed, situated in different districts shall, upon giving bond as required by the court, be vested with complete jurisdiction and control of all such property with the right to take possession thereof." 28 U.S.C. § 1692 provides that "[i]n proceedings in a district court where a receiver is appointed for property, real personal, or mixed, situated in different districts, process may issue and be executed in any district as if the property lay wholly within one district, but orders affecting the property shall be entered of record in each of such districts."

Titanic, Inc. V. Haver, 171 F.3d 943, 957 (4th Cir. 1999).

The complaint in this action, the allegations of which are presumed true for purposed of this motion, states that this action was brought in order to "accomplish certain of the objectives of the Receivership Order" entered in the proceedings against Bilzerian. Compl. ¶ 4. Therefore, it is an ancillary proceeding to the Bilzerian case. Haile v. Henderson Nat'l Bank, 657 F.2d 816, 822 ("[T]he initial suit which results in the appointment of the receiver is the primary action and ....any suit which the receiver thereafter brings in the appointment court in order to exercise his duties is ancillary to the main suit."); Tcherepnin v. Franz, 485 F.2d 1251, 1255-56 (7th Cir.1973) (:So long as an action commenced by a court appointed receiver seeks to accomplish the ends sought and directed by the suit in which the appointment was made, such action or suit is regarded as ancillary so far as the jurisdiction of the ... court of the United States is concerned.") (citation omitted). This Circuit has stated that in an ancillary action brought by a receiver, the district court's jurisdiction "extends to any district in which receivership property may be found 'provided that the proper documents have been filed as required by § 754.'" SEC v. Vision Communications, Inc., 74 F.3d 287, 291 (D.C. Cir. 1996) (quoting Moore's Federal Practice). The receiver has filed the documents required under Section 754 with the U.S. District Court for the Middle District of Florida. Compl.¶ 1. Her compliance with that section extends the jurisdiction of this Court to the Middle District of Florida. Vision Communications, 74 F.3d at 290.

The minimum contacts analysis developed in International Shoe and its progeny does not apply to cases in which nationwide service of process has been provided for under 28 U.S.C. § 1692, as in this case:

> In an action where service of process is effected pursuant to a federal statute which provides for nationwide service of process, the strictures of International Shoe do not apply . .. The process authorized by § 1962 is not "extra-territorial" but rather nationwide. The appointment court's process extends to any judicial district where receivership property is found. As such, the minimum contacts analysis, as a limitation on state extra-territorial power, is simply inapposite.

Haile, 657 F.2d at 825, 826. Rather, the question of constitutional due process is restricted to the issue of "whether the service [of process] was reasonably calculated to inform the defendants of the pendency of the proceedings against them in order that they might take advantage of the opportunity to be heard in their defense." Id. At 826. Defendant has been properly served with process. Def's Mem. In Support of His Mot. To Dismiss at 2 n.1. There is no allegation that the process served upon him failed to provide him with adequate notice of the proceeding against him. The requirements of due process have been satisfied by the proper service of process upon defendant. Accordingly, this Court has established jurisdiction over defendant's person. See Federal Rules of Civil Procedure 4(k)(1)(D) ("Service of a summons or filing a waiver of service is effective to establish jurisdiction over the person of a

defendant . . . when authorized by a statute of the United States.")

B. Venue

Defendant also alleges that the complaint lacks sufficient facts to demonstrate that venue properly lies with this Court, and that the Note and Stock Pledge Agreement provide for venue in another forum. As noted above, because the complaint states that the present action was brought "to accomplish certain objectives of the Receivership Order," it is an ancillary proceeding to SEC v. Bilzserian. Compl. ¶ 4. Where ancillary jurisdiction has been properly established, proper venue lies as well. See Haile, 657 F.2d at 922 n.6 ("[W]here jurisdiction is ancillary, the post-jurisdictional consideration of venue is ancillary as well")(citing cases); 20 Wright & Miller, Federal Practice & Procedure Deskbook § 10 ("It was usually held that where ancillary jurisdiction sufficed to allow a claim or a party without independent jurisdictional grounds, it was also unnecessary to satisfy the venue statutes with regard to that claim or party. The new statute has done nothing to change this, and the result seems right."). Therefore, the allegations in the complaint that "this is an action to accomplish certain objectives of the Receivership Order" and that "[v]enue is proper in this Court based upon, among other things, the Receivership Order [and] this Court's exclusive jurisdiction over the Receivership Estate" suffice to demonstrate that venue properly lies with this Court. The venue statute, 28 U.S.C. § 1391, does not alter this result. Section 1391 (b) lists the judicial districts in which venue for a non-diversity case properly lies,

"except as otherwise provided by law." Because venue in this case has been established in this jurisdiction by law, the venue provisions of Section 1391 (b) do not apply here.

Additionally, neither the Note nor the Stock Pledge Agreement mandate that venue lies in another forum. The Note provides that

> [v]enue for any legal proceeding arising under this Note or on the Stock Pledge Agreement shall be in the courts located in Hillsborough County, Florida and maker and Holder waive any right to sue or be sued in any other venue unless it shall be lawfully required that venue for any legal proceeding lie elsewhere.

Compl. Exh. C at 2 (emphasis added). As stated above, it has been established by law that proper venue for this action lies within this jurisdiction. Moreover, "even a mandatory forum-selection clause does not in fact divest a court of jurisdiction that it otherwise retains." Silva v. Encyclopedia Britannica, 239 F.3d 385, 389 n.6 (1st Cir. 2001). The qualifying language in the clause demonstrates that it is not a mandatory forum selection clause. Therefore, it is not necessary to dismiss this action for lack of proper venue.

C. Forum Non Conveniens

Defendant also urges this Court to dismiss this action based on the doctrine of forum non conveniens. As grounds for dismissal, defendant lists the forum selection clause, the fact that he resides in Florida,

that the plaintiff-receiver and her attorneys maintain an office in Florida, and that a related case is pending in Florida state court.

Defendant's assertion that the forum selection clause compels dismissal has already been determined to be without merit. As for the remaining grounds, "there is ordinarily a strong presumption in favor of the plaintiff's choice of forum, which may be overcome only when the private and public interest factors clearly point towards trial in the alternative forum." Piper Aircraft Co. V. Reyno, 454 U.S. 235, 255 (1981). A defendant seeking dismissal on forum non conveiens grounds must clearly demonstrate that litigation in the plaintiff's chosen forum would be vexatious and oppressive out of all proportion to plaintiffs' convenience in order to overcome the presumption in favor of plaintiffs' choice of forum. DiRienzo v. Philip Servs. Corp., 294 F.3d 21, 30 (2d Cir. 2002). The Court finds that defendant has failed to make this demonstration. Without such a showing, dismissal is not warranted because a dismissal on forum non conveniens grounds is the exception, not the rule. R. Maganlal & Co. V. M.G. Chemical Co., 942 F.2d 164, 168 (2d Cir. 1991); Lacey v. Cessna Aircraft Co., 862 F.2d 38, 46 (3d Cir. 1988).

D. Failure to Name an Indispensable Party

Defendant's final argument is that plaintiff-receiver has failed to name an indispensable party, warranting dismissal under R$ule 12(b)(7) of the Federal Rules of Civil Procedure. Dismissal is

available under Rule 12(b)(7) for failure to join a party deemed to be "indispensable" pursuant to Rule 19(b). The latter rule provides, in relevant part, that "[i]f a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable." The subdivisions provide for mandatory joinder of person if either

> (1) in the person's absence complete relief cannot be accorded among those already parties or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.

Defendant has failed to establish that OHLP, the original holder of the note on which the present action is based, meets the requirements of either of these subdivisions. Defendant is free to pursue his claims for damages in his state court action alleging breach of contract, negligent misrepresentation, and fraudulent misrepresentation against OHLP. Accordingly, there is no danger that the absence of OHLP from the instant proceedings will result in the inability to afford complete relief between plaintiff-receiver and defendant. Nor does the absence of OHLP

create any potential for inconsistent judgments. The basis for defendant's contention that the two actions could result in inconsistent judgments is his assertion that rescission is a remedy available to him in his state court action. However, the only remedy expressly sought by defendant in that action is damages. See Pl.'s Opp. Br., Exh.1. It may be true that the state of Florida has a "liberal policy of allowing amendments to pleadings." Burr v. Norris, 667 So.2d 424, 426 (Fl. Dist. Cl. App. 1996). Nevertheless, the issue is not whether defendant may amend his pleadings to include a claim for rescission, but whether the remedy of rescission is available to defendant. If the Florida state court were to grant rescission, their judgment could potentially be inconsistent with a judgment rendered by this Court. However, the remedy of rescission is not available to defendant in his state court action. In a recent case, the Supreme Court of Florida explained that

> [a] prerequisite to recission is placing the other party in status quo. As the court in Bass v. Farish, 616 So.2d 1146, 1147 (Fla. 4th DCA 1993), noted "Generally, a contract will not be rescinded even for fraud when it is not possible for the opposing party to be put back into his pre-agreement status." Moreover, a party's right to rescind is subject to waiver if he retains the benefits of a contract after discovering the grounds for rescission.
>
> A damages claim, by contrast, affirms the contract, and thus ratifies the terms of the agreement. This principle ensures that a party

> who "accepts the proceeds and benefits of a contract" remains subject to "the burdens the contract places upon him."
>
> As previously stated, the necessary precondition for rescission is tender of the benefits received under the contract. In effect, [appellants] elected to affirm the contract by not returning the settlement proceeds. As a result, they are bound by the terms of the contract[.]

Mazzoni Farms, Inc. v. E.I. DuPont de Nemours & Co., 761 So.2d 306, 313 (Fla. 2000)(citations omitted). In the instant case, defendant has not tendered the benefits that he received under the terms of the note, which includes $1,000,000 plus interest, to the current holder of the note. Accordingly, because defendant has failed to restore the status quo, which the Supreme Court of Florida has identified as a necessary precondition for the equitable remedy of rescission, defendant is not entitled to that remedy. There is thus no possibility, as matters currently stand, that any relief that could be afforded in the Florida suit would prove to be inconsistent with any relief that might be granted in the instant case.

In short, defendant has failed to demonstrate that either subdivision of Rule 19(a) applies in the instant case. Because OHLP is not a party whose presence is indispensable to this case, there is no basis for this Court to dismiss under Rule 12(b)(7).

III. CONCLUSION

Defendant has failed to demonstrate that dismissal of the present action is warranted. Accordingly, it is hereby ORDERED that defendant's motion to dismiss [6-1] be, and hereby is, DENIED.

SO ORDERED.

Date: 1/17/03

/s/ Royce C. Lamberth
Royce C. Lamberth
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 03-5237 September Term, 2004
02cv01221
Filed On: October 26, 2004

Securities and Exchange Commission,
Appellee

v.

Paul A. Bilzerian and Deborah Meshulam,
Appellees

Ernest B. Haire,
Appellant

BEFORE: Sentelle, Rogers, and Garland, Circuit Judges

O R D E R

Upon consideration of appellant's petition for rehearing filed September 27,2004, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk
BY: /s/ Nancy G. Dunn
Nancy G. Dunn
Deputy Clerk

APPENDIX D

CONSTITUTIONAL AND STATUTORY PROVISIONS

FIFTH AMENDMENT TO THE U.S. CONSTITUTION

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

* * * * * * * * * *

28 U.S.C. § 754.

754. Receivers of property in different districts.

A receiver appointed in any civil action or proceeding involving property, real, personal or mixed, situated in different districts shall, upon giving bond as required by the court, be vested with complete jurisdiction and control of all such property with the right to take possession thereof.

He shall have capacity to sue in any district without ancillary appointment, and may be sued with respect thereto as provided in section 959 of this title.

Such receiver shall, within ten days after the entry of his order of appointment, file copies of the complaint and such order of appointment in the district court for each district in which property is located. The failure to file such copies in any district shall divest the receiver of jurisdiction and control over all such property in that district.

* * * * * * * * * * *

28 U.S.C. § 1692

1692. Process and orders affecting property in different districts.

In proceedings in a district court where a receiver is appointed for property, real, personal, or mixed, situated in different districts, process may issue and be executed in any such district as if the property lay wholly within one district, but orders affecting the property shall be entered of record in each of such districts.